No. 20,781

In the United States Court of Appeals for the Ninth Circuit

RETAIL CLERKS UNION, LOCAL NO. 1179, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

Cases:

Cases—Continued Page

Cases—Continued

Miscellaneous:

Statutes: Page

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JURISDICTION

This case is before the Court upon petition of Retail Clerks Union, Local No. 1179, Retail Clerks International Association, AFL-CIO (the Union), to review and set aside an order of the National Labor Relations Board dismissing the complaint against John P. Serpa, Inc. (the employer), on October 8, 1965, following the usual proceedings under Section 10(c) of the National Labor Relations Act, as amended (61

Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The Board's decision and order (R. 23-25)[1] are reported at 155 NLRB No. 12. This Court's jurisdiction is invoked under Section 10(f) of the Act.

COUNTERSTATEMENT OF THE CASE

The employer is a corporation engaged in the retail sale of automobiles at Martinez and Concord, California (R. 5, 9, 13). John P. Serpa, an owner of the Company for 43 years, currently owns 50 percent of the shares of the corporation; he is ill and no longer able to work (Tr. 49-50). Fred Peri owns the remaining shares and is the general manager (Tr. 12).

The employer is a member of the Contra Costa Automotive Association, Inc., which is authorized to represent the Company "in all matters pertaining to our employee relations . . ." and to act in its behalf "in the negotiation, execution and administration of collective bargaining agreements with labor unions . . . on the subject of wages, hours, working conditions, and other terms of employment. . ." (R. Exh. 5).[2] Pursuant to this authorization, the association

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[1] References designated "R". are to Volume I of the Record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the Record. References designated as "G.C. Exh.", or "R. Exh.", are to exhibits of General Counsel and Respondent, respectively.

[2] Thus, petitioner's comment (Br. p. 3) that Peri is "in charge" of the employer's labor relations is misleading. The employer has had no labor relations other than through the association and Peri is completely inexperienced in dealing with labor organizations (Tr. 13, 105).

has negotiated collective bargaining agreements with the unions [3] which represent various of the employer's employees (R. 14; R. Exh. 1, Tr. 9-10). The employer's salesmen, the subject of this proceeding, have never been represented by a union (Tr. 49).

At the time of the events in question, the Company employed 7 salesmen, 5 at Martinez and 2 at Concord. In September 1964, the Union undertook to organize them,[4] and on September 25 had obtained 5 authorization or application cards (G.C. Exh. 3a-3e). At approximately 5:50 p.m. on Friday, September 25, Union agents, Roddick, Paddock and Atkinson presented themselves to Peri at the employer's Martinez office. Roddick handed Peri a letter demanding recognition (G.C. Exh. 2; Tr. 16), and a recognition agreement (G.C. Exh. 4); he also spread the five cards on the table, suggesting that Peri check them against a payroll.[5] After reading the letter and glancing briefly at

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[3] Lodge 1173, International Association of Machinists, and General Truck Drivers and Helpers, Local No. 315.

[4] On September 16, 1964, the Union began picketing the employer's Martinez premises with "informational" signs. During the first week in October the signs were changed to protest "unfair practices," and the picketing continued until about December 19, 1964 (R. 15; Tr. 14-15, 122, 146). None of the employees engaged in the picketing. When the picketing first began, Union organizer Paddock told Peri that the Union was going to organize the salesmen. Peri told him (Tr. 143) "we have a union in the back, and we deal as an Association. Why don't you go over there and get everybody organized, and we have no problems?"

[5] Roddick later withdrew this suggestion since he considered a card check unnecessary (Tr. 27-28). Contrary to the assertion in the Union's brief (Br. pp. 3, 11, 15) none of the Un-

the recognition agreement, Peri asked Roddick, "What does this mean? * * * I don't understand what this is all about" (R. 14; Tr. 17, 20, 22, 70-71, 85).[6] Roddick told him that the Union wanted recognition; he also told Peri that he "was entitled to a lawyer to have this clarified better" (R. 14, 23; Tr. 20, 22), and suggested that Peri call his attorney. Peri replied that he could not get an attorney so late in the day but could "probably get him tomorrow" (Tr. 20). The Union representatives agreed and did not press for immediate recognition. As they prepared to leave,[7] Roddick gave Peri a business card on which he wrote his home telephone number. Roddick then warned Peri about firing or "being a little bit rough" with employees who had signed cards (Tr. 86). Peri replied, "Hell, no, they have the right to sign if they want to." According to Roddick, "these were his exact words, that it reflected his feeling" (Tr. 86). A few days

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ion's agents offered to have the cards checked by a neutral third party, and, as shown, the Union dropped its suggestion that the employer himself, at the September 25 meeting, check the cards against the payroll.

[6] At some point during this meeting Peri said to Paddock, "I can't sign it. * * * You know I can't sign it" (Tr. 23, 165). This apparently referred to the fact that Peri had previously (see n. 4, *supra*) told Paddock that the employer conducted its labor relations through the association, and to Peri's belief that he was bound by the terms of his authorization to the association which contained a promise not to enter into any agreement with any bargaining representative "unless and until such agreement . . . has first been submitted to and approved in writing by the Association" (R. Exh. 5, par. 3).

[7] The entire meeting lasted approximately 5 minutes (Tr. 46).

later Peri expressed "his feeling" directly to some of the employees when they sought to discuss the Union with him.[8] "I told them this was their business; they could do what they wanted" (Tr. 145).

Peri consulted his attorney on Saturday, September 26, but did not thereafter call Roddick (R. 14, 24; Tr. 24, 144, 149-150). The Union did not, after the September 25 meeting, call the employer, did not attempt to determine whether Peri had signed the recognition agreement, and gave no consideration to further contact with the employer (R. 16; Tr. 75, 82, 97, 98, 99). Instead, not having heard from Peri by Tuesday, September 29, the Union's attorney prepared an unfair labor practice charge (R. 3), which was filed the following day.

A day later, on October 1, Peri met Union agent Atkinson at the Concord lot. Atkinson asked if the employer had signed the agreement. Peri replied that he had not, and that if the Union wanted recognition it should contact Mr. Shepherd of the dealers' association (R. 14; Tr. 31, 32, 61, 74, 78). Atkinson replied that he had seen Shepherd that morning.

On October 13, 1966, the employer filed a representation petition with the Board seeking an election among the employer's salesmen (R. 15; Tr. 8, 136). Because of the pendency of the Union's unfair labor practice charge, no election has been held.

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[8] By September 30, Peri had received written notification from two employees informing him that they no longer wanted the Union to represent them (R. 14; R. Exh. 2, 3). The Union received similar notification from four employees at a later date (Tr. 99-101).

THE BOARD'S CONCLUSION AND ORDER

The Board, adopting the fact findings, credibility resolutions and conclusion of the Trial Examiner, dismissed the complaint.[9] Upon the foregoing facts it concluded that the General Counsel had not sustained his burden of proving that the employer's failure to recognize the Union was motivated by bad faith, i.e., the evidence failed to show that the employer declined to recognize the Union in order to gain time in which to undermine its majority status, or that his failure to grant recognition manifested a rejection of the collective bargaining principle.

ARGUMENT

The Board Properly Dismissed the Complaint

A. *The controlling principles*

1. *The statutory standard*

As noted, *supra*, pp. 3-4, in a brief meeting with Peri, the Union's agents demanded recognition, presented authorization cards from 5 of the employer's 7

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[9] The Trial Examiner found that the designation cards did not reliably evidence the considered preference of the signers (R. 16), in view of the almost immediate withdrawal by the employees of their authorizations to the union. (R. 14, 16; R. Exh. 2, 3; Tr. 99-101) Accordingly, he concluded that it would not effectuate the policies of the Act "to proclaim the union to be the exclusive representative of [Serpa's] salesmen upon the basis of such a fleeting and evanescent majority" (R. 16). Since the Board decided the case on other grounds, it did not pass upon the Trial Examiner's rationale insofar as it rested upon his finding of a "fleeting and evanescent" majority (R. 24, n. 2).

salesmen, advised Peri that he was "entitled to a lawyer to have this clarified better," and received his assurances that he would not punish the employees for having signed cards. On these undisputed facts,[10] the Board dismissed the complaint, concluding that they were insufficient to establish a *prima facie* case that the employer's failure to recognize the Union was motivated by bad faith. Thus, the issue in the instant case is whether the Board could reasonably have found that the preponderance of the evidence failed to sustain the allegations of the complaint. Where, as here, the Board finds that an employer's conduct did not violate the Act, its determination will be upheld unless it has "no rational basis," *Mississippi Valley Barge Line Co.* v. *U.S.* 292 U.S. 282, 286-287; *International Woodworkers* v. *N.L.R.B.*, 263 F. 2d 483, 485 (C.A. D.C.); *Amalgamated Clothing Workers* v. *N.L.R.B.*, —— F. 2d —— (C.A. D.C.) 62 LRRM 2431, 2440, or unless

[10] Petitioner erroneously characterizes this case as one in which the Board's factual determinations conflict with those of the Trial Examiner, contending that such conflict weakens the Board's ultimate conclusion. There is no conflict between the Examiner and Board with respect to "evidence supporting [the Board's] conclusion." *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 496. Rather, the difference between them on the good faith issue (as petitioner implicitly concedes (Br. p. 15, second paragraph)), is whether the undisputed facts amount to a violation of law. The ultimate disposition of such questions is clearly for the Board—not the Trial Examiner. *Oil Chemical and Atomic Workers, etc.* v. *N.L.R.B.*, —— F. 2d —— (C.A. D.C.), 62 LRRM 2238, 2240. Moreover, as is apparent, *infra.* p. 8, the Trial Examiner, to the extent his decision conflicts with the Board's on the good faith issue, applied an incorrect standard in shifting the burden of proof from the General Counsel to the employer.

"the evidence required the Board to uphold the claim." *Amalgamated Clothing Workers* v. *N.L.R.B.*, 334 F. 2d 581 (C.A. D.C.). The Union can make no such showing here. Accordingly, the Board's dismissal of the complaint should be sustained.

2. *Burden and elements of proof*

The premise implicit in petitioner's contentions is that an employer who has declined to recognize a union on the basis of a majority card showing, must, in order to avoid the proscription of Section 8(a)(5), carry the burden of proving that it was not guilty of bad faith when it declined recognition. In the Board's view, however, the initial burden is on the General Counsel, and the employer need not come forward to justify a refusal to accord recognition until the General Counsel has established a *prima facie* case of bad faith. Thus:

> In a case such as this, where an employer refuses to recognize a union upon a showing that a majority of its employees in an appropriate unit have signed cards designating the union as their representative, our recent decisions have made it clear that the critical issue is whether the General Counsel has carried the burden of showing that the refusal to bargain was in bad faith. [Footnote omitted.]

Drug King, Inc., 157 NLRB No. 30.[11] Furthermore,

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[11] Accord: *Jem Manufacturing Inc.*, 156 NLRB No. 62; *Strydel Incorporated*, 156 NLRB No. 114; *Ben Duthler, Inc.*, 157 NLRB No. 3; *Aaron Brothers Company of California*,

> Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority. [Footnote omitted.]

Aaron Brothers Company of California, supra, n. 11.[12]

Such an "affirmative showing of bad faith" may be demonstrated by evidence that the employer, believing the union to be the representative of his employees, refused recognition in order to gain time within which to undermine the union and dissipate its majority status,[13] or because he rejected the statutory principle of collective bargaining.[14] Such a determination requires, in turn, an assessment ". . . of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct." *Joy Silk Mills, Inc.* v. *N.L.R.B., supra* at 741.

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158 NLRB No. 108; *Mutual Industries, Inc.,* 159 NLRB No. 73; *Master Transmission Rebuilding Corporation & Master Parts, Inc.,* 155 NLRB No. 35; *Hammond & Irving, Incorporated,* 154 NLRB No. 84; *Oklahoma Sheraton Corp.,* 156 NLRB No. 69.

[12] Accord: *Briggs IGA Foodliner,* 146 NLRB 443; *Cameo Lingerie, Inc.,* 148 NLRB 535; *Strydel, Incorporated, supra,* n. 11.

[13] See, e.g., *Joy Silk Mills, Inc.* v. *N.L.R.B.,* 185 F. 2d 732, 741 (C.A.D.C.), cert. denied, 341 U.S. 914; *N.L.R.B.* v. *Trimfit of California, Inc.,* 211 F. 2d 206 (C.A. 9).

[14] See, e.g., *N.L.R.B.* v. *George Groh & Sons,* 329 F. 2d 265 (C.A. 10).

Although the commission of unfair labor practices contemporaneous with a refusal to recognize is a powerful indication of employer bad faith, not all unfair labor practices are of a kind or gravity to denote a purpose to deprive employees of their right to collective bargaining.[15] On the other hand, bad faith may be indicated by conduct which does not amount to an unfair labor practice. For instance, in *Snow* v. *N.L.R.B.*, 308 F. 2d 687 (C.A. 9), the union achieved a card majority and asked for recognition. The employer, through counsel, assured the union that it did not believe the union had used illegal or coercive tactics in obtaining the employees' signatures, and agreed to abide by a card check in determining whether to recognize the union. A minister, after verifying the employees' signatures, made a written report to the employer confirming the union's majority status. The employer then reneged on his agreement and refused to recognize the union. This Court affirmed the Board's finding that such conduct clearly indicated bad faith. See also, *N.L.R.B.* v. *Hyde*, 339 F. 2d 568 (C.A. 9); *N.L.R.B.* v. *Kellogg Mills*, 347 F. 2d 219 (C.A. 9), enforcing 147 NLRB 342; *N.L.R.B.* v. *George Groh & Sons*, 329 F. 2d 265 (C.A. 10); *Jem Mfg. Inc.*, 156 NLRB No. 62.

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[15] See, e.g., *Cameo Lingerie, Inc.*, 148 NLRB 535, 538; *Cosmodyne Manufacturing Company*, 150 NLRB 96, 104, n. 29; *Hammond & Irving, Inc.*, 154 NLRB No. 84; *Clermont's, Inc.*, 154 NLRB No. 111; *Strydel, Inc.*, 156 NLRB No. 114; *Aaron Brothers of California*, 158 NLRB No. 108. See also, *N.L.R.B.* v. *Flomatic Corporation*, 347 F. 2d 74 (C.A. 2).

B. *The General Counsel did not carry the burden of proving that the employer's failure to recognize the Union was motivated by bad faith*

Applying the foregoing principles, we submit that the Board could properly find that the evidence adduced in this case was insufficient to establish that the employer's failure to recognize the Union was motivated by bad faith. Although he knew on September 16 that the Union was attempting to organize his employees, he did not commit unfair labor practices,[16] or make anti-union speeches, or engage in a campaign of interrogation, or threaten his employees either before or after the Union told him that some had signed cards. In fact, the contrary is true; Peri assured the Union representative *and* the employees that he considered the matter of unionization to be the employees' business—not his (see pp. 4-5, *supra*). Plainly, then, Peri did not, on September 25, decline recognition in order to engage in conduct designed to dissipate the Union's strength. Nor did Peri show hostility to the collective bargaining principle; most of his employees were unionized, and he bargained with two unions through the employer association. He repeatedly told the Union representatives here that he would prefer to deal with them through the association.[17]

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[16] See, pp. 20-24, *infra*.

[17] Petitioner's attempt (Pet. Br. pp. 5, 10) to attribute an anti-union state of mind to Peri is based on a statement in Union agent Atkinson's October 1 report to the Union that Peri said he would never deal with the Union. Petitioner's contentions with respect to this incident are grossly misleading because it has taken the statement wholly out of context. A reading of the entire testimony (Tr. 31, 32, 61, 74, 78)

Thus, petitioner's case boils down to the contention that a union's tender of cards to an employer, if made in a manner that permits the employer to examine the cards, is sufficient to erase all doubt in the employer's mind regarding the union's status. Proceeding from this assumption, petitioner argues that the employer had "actual knowledge" (Br. p. 15) of the Union's majority status, and that the failure to recognize the Union in such circumstances, without more, evidences the employer's bad faith. Petitioner also argues (Br. p. 17) that the employer's desire to consult with its attorney and its failure to communicate with the Union thereafter,[18] "amply manifests a complete rejection of the principle of collective bargaining." These contentions are wholly without merit.

We submit that the Board was clearly correct in concluding that a mere examination of proffered authorization cards "cannot create the obligation to bargain or establish [the employer's] bad faith" (R. 24). An examination can indicate that a majority of employees have signed cards; it cannot, alone, indicate the circumstances under which the signatures were solicited or obtained, or resolve the question whether the cards reliably express the employees' desire for

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shows clearly that Peri was merely restating his consistently held position (Tr. 23, 31, 32, 61, 74, 78, 105, 108, 143, 165), that he would prefer to deal with the Union through the association rather than in a single-employer unit. This was Atkinson's understanding of Peri's statement at the time he reported it to the Union (Tr. 74).

[18] Peri consulted with his attorney on September 26. The Union prepared an unfair labor practice charge on September 29, and filed it the following day.

representation.[19] Accordingly, absent an affirmative showing of bad faith, based on evidence extrinsic to the cards themselves, an employer does not violate Section 8(a)(5) if he declines recognition when faced with a request to bargain and a proffer of cards, and instead petitions for a Board-conducted election. For it is universally acknowledged that where, as here, an employer has not engaged in conduct that would distort the election process, "an election by secret ballot is normally a more satisfactory means of determining employees' wishes . . . ." *Aaron Brothers Company of California*, 158 NLRB No. 108.[20]

Petitioner's attempt to liken this case to *Snow*, *supra*, is unavailing. There is no evidence in this case that the employer had independent, reliable knowledge that the Union represented a majority of his employees when he declined recognition. In *Snow*, the employer expressed satisfaction that the cards were properly obtained, and agreed to consider them an accurate reflection of his employees' desires; when the card check which he had agreed would settle the

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[19] The Trial Examiner found, in view of the almost immediate withdrawal by two of the employees of their authorizations to the Union, that the cards "did not reliably evidence the considered preference of the signers" (R. 16). See n. 9, *supra*.

[20] See also, *The Cudahy Packing Co.*, 13 NLRB 526, 531-532; *N.L.R.B.* v. *Flomatic Corporation*, 347 F. 2d 74, 78 (C.A. 2), and authorities there cited. Address of Board Chairman McCulloch, 1962 Proceedings, Section of Labor Relations Law, American Bar Association, 14-17; Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 Harv. L. Rev. 38, 122.

matter showed that the union did represent a majority of his employees, he reneged and refused recognition. It is apparent that in *Snow*, the employer accepted the cards but rejected the union and the collective bargaining principle. In contrast, in the case at bar, the employer had no opinion with respect to the reliability of the cards or the true desires of his employees,[21] and declined recognition in order to seek legal advice—a course of conduct in which the Union fully acquiesced at the time but which it now brands as a rejection of the collective bargaining principle.[22] Since Peri did not accept the cards as a reliable indication of his employees' wishes, a card check by a

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[21] Contrary to petitioner's contentions (Br. pp. 11, 15), Peri did not have "actual knowledge" that the Union represented a majority of his employees, and did not concede at the September 25 meeting that he did. Peri's actual knowledge was limited to the facts that he employed seven salesmen and that the Union presented five authorization cards. His remark "what comment could I make?", on which petitioner so heavily relies (Br. pp. 4, 13), reefrs not to Peri's belief that the Union represented the employees, but to the indisputable fact that the Union presented five cards—a fact which is conceded (Tr. 158) but which is insufficient in itself to establish the employer's obligation to bargain. See, e.g., *Snow* v. *N.L.R.B.*, 308 F. 2d 687, 691 (C.A. 9); *Amalgamated Clothing Workers* v. *N.L.R.B.*, —— F. 2d —— (C.A.D.C.), 62 LRRM 2431.

[22] The Examiner's decision takes note of the Union's agreement that the employer should consult his attorney: ". . . it is not asserted that Peri acted improperly in delaying action so that he might obtain counsel and I think it doctrinaire to conclude that by failing to communicate with the Union before September 30 he demonstrated a determination not to afford the salesmen their right to have representation" (R. 16). See, *infra*, pp. 15-16.

neutral party or directly by the employer would have been pointless.[23]

Petitioner's further contention (Br. p. 17), that the employer's desire to consult his attorney, and his subsequent failure to communicate with the Union (between September 26 and 30) "amply manifests a complete rejection of the principle of collective bargaining" is a gross exaggeration. Assuming, *arguendo*, that an employer's desire to consult his attorney when faced with a demand to make a legal commitment could ever be considered an unfair labor practice or evidence of bad faith, this case is surely not an appropriate vehicle for such a finding. Here, Peri, completely inexperienced in matters of this sort,[24] was confronted by three Union officials who demanded that he sign a recognition agreement. Faced with that demand, Peri expressed his lack of understanding with respect to the import or significance of the obligations he was being asked to assume. Union agent Roddick acknowledged Peri's dilemma and suggested that he "was entitled to a lawyer to

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[23] Petitioner's attempt to imply (Br. p. 15) that the employer directly participated in a card check and then repudiated the "results," is unsupported by the record. As noted, *supra*, n. 5, the Union dropped its suggestion that Peri check the cards against the payroll, and left the September 25 meeting without having the signatures verified. Thus, there was no check and no "results" to be repudiated by the employer. In any event, even had the Union insisted on a check of the cards, the employer could have refused, without violating Section 8(a)(5) of the Act. *Strydel Incorporated*, 156 NLRB No. 114.

[24] The Company's labor relations are handled by an employer association, *supra*, pp. 2-3, n. 2.

have this clarified better" (Tr. 20, 22). The Union agents left shortly thereafter, deferring their demand for recognition until after Peri consulted his attorney. At the hearing Union agent Roddick conceded that the Union made no further attempt to contact the employer, indeed, did not even consider such a course of action. Instead, not knowing whether the employer had signed the agreement or had consulted his attorney, the Union, five days after its only meeting with the employer, filed a charge alleging a bad faith refusal to bargain. Under these circumstances, we submit that petitioner's contention that the employer rejected the collective bargaining principle finds no support in the record. Cf. *Phelps Dodge Corp.* v. *N.L.R.B.*, 354 F. 2d 591 (C.A. 7).[25]

In sum, petitioner has failed to show that the evidence adduced at the hearing—involving mostly inaction by both Union and employer—requires a finding that the employer was motivated by bad faith in failing to recognize the Union on September 25. Indeed, the Trial Examiner found it necessary to distinguish between 1) the fact that recognition was not granted, and 2) a conscious decision by the employer not to recognize the Union; he held that there was no support in the record for the latter (Tr. 159).

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[25] In *N.L.R.B.* v. *Howe Scales, Inc.*, 311 F. 2d 502 (C.A. 7), the case cited by petitioner to support its contention that failure of the employer to contact the union within four days, constitutes "undue delay," the union had written to the employer twice, but did not receive an answer for six weeks. The other case cited by petitioner (*Economy Food Center, Inc.*, 142 NLRB 901, enf'd. 333 F. 2d 468 (C.A. 7)), does not appear to stand for the proposition for which it is cited.

Such a finding is surely not tantamount to the "affirmative showing of bad faith" *(Aaron Brothers of California, supra)* required to support an unfair labor practice finding in this type of case.

Petitioner has cited a dozen cases (Br. p. 12) which, it claims, show that the Board has held conduct "precisely identical" to this employer's to be an unfair labor practice. Its contention is refuted by every case it cites; as we now show, each is distinguishable from the instant case in a substantial and significant way. *Dixon Ford Shoe Co., Inc.*, 150 NLRB 861, is a case precisely like *Snow, supra*, in which the employer agreed to accept authorization cards as an accurate reflection of the employees' desires, and then refused recognition when the cards showed a majority for the union. In *Cullen-Thompson Motor Co.*, 94 NLRB 1252, enf'd. 201 F. 2d 369 (C.A. 10), the employer had no doubt about the union's majority status and told the union that there was no reason why he should not recognize and bargain with it; he later refused to do so, informing the union he would not even honor a certification based on a Board election. In *Robert P. Scott, Inc.*, 134 NLRB 1120, the employer accepted the authorization cards as indicative of a union majority, but then informed the union that he could "fire all these men," that he would not negotiate, that he "would never work Union," and that he would operate his business any way he wanted. In *Webb Fuel Company*, 135 NLRB 309, enf'd. 308 F. 2d 936 (C.A. 6), the employer, after being informed by the union that it

had signed up his only two office employees, asked both employees if they had joined. The employees confirmed the fact, but the employer then refused recognition. In *Kellogg Mills*, 147 NLRB 342, enf'd. 347 F. 2d 219 (C.A. 9) and *Jem Mfg., Inc.*, 156 NLRB No. 62, the employers acknowledged the unions' majority status and commenced bargaining. Thereafter, in each case, the employer retained new counsel, and withdrew recognition, claiming that prior to commencing negotiations it actually had a good faith doubt as to the unions' majority. Similarly, in *Air Filter Sales & Service of Denver, Inc.*, 142 NLRB 384, the employer first accepted the union's majority, established by authorization cards, and proceeded to discuss contract proposals. Later, the employer evaded the union and failed to return its numerous phone calls. Finally, the company's board of directors and officers refused to deal with the union on the ground that the financial condition of the company precluded unionization of its employees. In *Greyhound Terminal*, 137 NLRB 87, 89, enf'd. 314 F. 2d 43 (C.A. 5), the employer told the union that there was no doubt in his mind that the union represented his employees. Later he said he had "talked too much" and demanded an election. The employer in *George Groh & Sons*, 141 NLRB 931, enf'd 329 F. 2d 265 (C.A. 10), declined a card check saying that "he was satisfied" that the union represented the employees. Despite such acknowledgement he told the union's officials that he wasn't interested in the union, that they were wasting their time because he wanted no part of the union. When the

union persisted, the employer sent its counsel to his lawyer, who, it turned out, was not in town. The employer then advised union's counsel that it had retained another attorney to represent it and suggested he deal with that attorney. When the union's attorney sought to do so, he was advised that the attorney had not been retained by the employer. In *Henry Spen & Company, Inc.*, 150 NLRB 138, the employer consistently evaded meeting with the union. During a 10-day period the union repeatedly telephoned the employer's representative, but was told each time that he was not in. The calls were never returned. Finally, the union sent a telegram to the employer offering to make available to him "documentary proof of its status as majority representative of your employees" (*id.* at 153). The company did not reply. In *Harry's TV Sales*, 143 NLRB 450, the union received signed authorizations from all six of the employer's employees. It submitted the cards and asked for recognition. At the same time, all employees picketed the employer's premises. When the employer's attorney asked for an opportunity to investigate the circumstances under which the cards were signed, the union's agent offered to make all employees available for questioning and suggested an immediate election. Employer's counsel then declined recognition on the basis that the employer would be put in an unfair competitive position if it had to meet the union's "ridiculous" demands (*id.*, at 453). The employer then committed unfair labor practices which broke the strike.

Thus. contrary to petitioner, it is evident that the Board has not held an employer in violation of Section 8(a)(5) under the circumstances present here. For a mere proffer of cards, an agreement that the employer would consult his attorney, and an absence of communication for 4-5 days are clearly an insufficient basis on which to make "an affirmative showing of bad faith." [26]

C. *Petitioner's remaining contentions are without merit*

Petitioner contends that the Board erred in failing to find that the employer violated Section 8(a)(1) of the Act by threatening certain pickets (not employees) on various occasions from mid-October to mid-November. It argues, in effect, that such conduct shows that the employer, in declining recognition on September 25, did so in bad faith, intending to gain time in which to dissipate the Union's support. Both contentions are without merit.[27]

It is clear that the issue now injected by the Union was not properly before the Trial Examiner or Board. The complaint (R. 5-8) did not allege that the employer had violated Section 8(a)(1) of the Act and did not allege conduct which could support such a

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[26] See *Superex Drugs, Inc.*, 150 NLRB 972, and cases cited, *supra*, n. 12.

[27] The Trial Examiner, whose decision was affirmed by the Board, refused to find a Section 8(a)(1) violation because the complaint failed to allege either a violation of that section, or any conduct which could support such a finding (R. 5-8, 15). He found, in any event, that "the threats were uttered some time after the Union had lost its majority and have no relevance to that loss" (R. 16).

finding. Neither General Counsel nor petitioner sought to include such allegations by amending the complaint,[28] and no motion was made to conform the pleadings to the proof. Under the circumstances, it is clear that the employer did not have notice or sufficient opportunity to fully litigate an 8(a)(1) issue and in fact did not do so. Although counsel for employer cross-examined the Union's witnesses, he did not produce any witnesses of his own to impeach or rebut their testimony, nor did he offer additional evidence. Clearly, these omissions could have been rectified had counsel known that an 8(a)(1) issue was in the case. In asking the Board, and the Court, to find a violation not alleged or litigated, petitioner is at odds with settled judicial precedent precluding such finding,[29] with Section 5 of the Administrative

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[28] In fact, counsel for General Counsel disclaimed any intent to prove a Section 8(a)(1) violation (Tr. 36-38, 114). See *I.U.E.* v. *N.L.R.B.*, 289 F. 2d 757 (C.A.D.C.). Union's counsel did not give the slightest indication that it was seeking to prove an 8(a)(1) violation until it submitted its brief to the Trial Examiner.

[29] *Douds* v. *International Longshoremen's Ass'n*, 241 F. 2d 278, 283 (C.A. 2). "The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing." See also, *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C.A. 7); *N.L.R.B.* v. *E&B Brewing Co.*, 276 F. 2d 594, 598-599 (C.A. 6), cert. denied, 366 U.S. 908; *N.L.R.B.* v. *Johnson*, 322 F. 2d 216 (C.A. 6), cert. denied, 376 U.S. 951; *Northeastern Indiana Bldg. & Constr. Trades Council* v. *N.L.R.B.*, 352 F. 2d 696, 698-699 (C.A. D.C.) and cases cited at n. 4; *N.L.R.B.* v. *Majestic Weaving Co., Inc.*, 355 F. 2d 854 (C.A. 2).

Procedure Act (5 U.S.C. 1004),[30] with Section 10(b) of the NLRA,[31] and with Section 102.15 of the Board's Rules and Regulations.[32]

Independent Metal Workers Union Local 1 (Hughes Tool Co.), 147 NLRB 1573, and *N.L.R.B.* v. *Puerto Rico Rayon Mills*, 293 F. 2d 941 (C.A. 1), relied upon by petitioner (Br. p. 18), are clearly distinguishable. In *Hughes*, both the Trial Examiner (at p. 1602) and the Board majority (at p. 1576) concluded that "where the complaint clearly describes an action which is alleged to constitute an unfair labor practice . . .," and the conduct alleged is fully litigated, the Board may find that it violates a section of the Act in addition to that alleged in the complaint, even though General Counsel had chosen "not to allege as a legal conclusion that the pleaded and litigated facts violate those [additional] sections of the Act." Similarly, in *Puerto Rico Rayon Mills*, *supra*, although the section of the Act which the Board found violated was not included in the complaint, the *conduct* which supported the Board's finding *was* alleged, and was fully

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[30] Section 5 provides, "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . (a) Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted."

[31] Section 10(b) refers to "a complaint stating the charges."

[32] Section 102.15 provides that a complaint must contain a "clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of the respondent's agents or other representatives by whom committed."

litigated at the hearing. See also *N.L.R.B.* v. *H.E. Fletcher Co.*, 298 F. 2d 594, 600 (C.A. 1). Here, in contrast, the complaint alleged neither the conduct nor the section supposedly violated, and the issue was not fully litigated at the hearing.

In any event, it is clear that the employer's conduct at the picket line was neither in response to, nor directed against, the Union's organizational campaign and was not the kind of conduct designed to discourage his employees from joining the Union.[33] Rather the "threats" [34] were made in angry response to the picketing of the employer's premises with signs accusing him of unfair labor practices (Tr. 122), and to the success of the pickets who, on several occasions,

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[33] See cases cited, *supra*, n. 15.

[34] The threats of harm sometime in the future "after all this is over . . ." (Tr. 127), were obviously empty. Mrs. Walker, a picket who was threatened once in six weeks of picketing testified that she was "enjoying it very much," that she "didn't want to be rude and laugh in [manager Ackerson's] face" (Tr. 119), and just continued to picket. Another picket, Mrs. Bostick, was also threatened once during her shorter employment on the picket line (Tr. 110-116). A third picket, Joe Pimental, was threatened on several occasions by Serpa himself. The record shows that Serpa is a "little fellow of advanced age" (Tr. 129) with one arm (Tr. 128-129), who is "sick and can't work" (Tr. 50). Pimental is 34 years old, weighs 220 pounds and is six feet tall. Although Pimental testified to his belief that "all [Serpa's] strength is in that one hand" (Tr. 130), it is apparent that Pimental lacked Mrs. Walker's ability to place these incidents in perspective. Cf. *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287, 293; *Free Play Togs, Inc.*, 140 NLRB 1428; *Twin Kee Mfg. Co.*, 130 NLRB 614. No attempt was ever made to carry out these threats (Tr. 116, 120).

turned away prospective customers and deliveries (Tr 113, 118-119, 122, 124, 126-127). Thus, it cannot be said that the employer's conduct in October and November shows that on September 25 he declined recognition because of anti-union animus, and that he then intended to undertake a course of conduct designed to undermine the Union.[35] As we have shown, *supra*, pp. 4-5, 11, Peri's attitude toward unionization was reflected in his "hands off" statements to the Union agents and the employees at the time of the Union's campaign, and his total lack of any campaign activity—legal or illegal—against the Union, even though he was told on September 16 that the Union intended to organize his salesmen.

[35] The employer was well aware, at the time of these incidents, that a majority of the employees did not want the Union to represent them (R. 14; Tr. 145-146, R. Exh. 2, 3).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition to review and set aside the Board's order should be denied.

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September 1966

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Representatives and Elections

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the ma-

jority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

* * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of rep-

resentation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint . . .

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in ques-

tion occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the justification of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in Section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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